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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

11 IN RE: HIGH-TECH EMPLOYEE  
12 ANTITRUST LITIGATION

13 THIS DOCUMENT RELATES TO:  
14 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' JOINT  
ADMINISTRATIVE MOTION FOR  
LEAVE TO SUPPLEMENT THE  
RECORD IN SUPPORT OF  
DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION FOR CLASS  
CERTIFICATION; DECLARATION OF  
ERIC B. EVANS; SUPPLEMENTAL  
DECLARATION OF KEVIN MURPHY;  
PROPOSED ORDER**

Pursuant to N.D. Cal. Civ. L.R. 7-11 and 7-3(d), Defendants jointly seek leave to supplement the record with limited evidence to address and correct incomplete and misleading information first submitted by Plaintiffs in their reply to Defendants' opposition to Plaintiffs' class certification motion. Defendants do not seek additional briefing, nor do they seek a surreply. Instead, Defendants seek leave to file the following:

- (1) a short supplemental declaration from Dr. Kevin Murphy setting forth data showing the complete and accurate salary, compensation history and job titles for certain Apple and Intel employees, a portion of which was discussed at paragraphs 63-64 of Dr. Edward Leamer's reply declaration, cited at page 24 of Plaintiffs' reply brief, and partially corrected by Plaintiffs' December 12 letter to the Court;
- (2) excerpts from Dr. Kevin Murphy's deposition that, in accord with the rule of completeness, correct mischaracterizations of his testimony in Dr. Leamer's reply declaration and in Plaintiffs' reply brief;

This limited and highly relevant evidence is necessary to allow Defendants, during oral argument before this Court, to fairly address information Plaintiffs first submitted with their reply brief and supporting papers, and to ensure that the record contains correct and complete information.

#### **Background**

On December 10, 2012, Plaintiffs filed their Consolidated Reply in Support of Motion for Class Certification and Opposition to Defendants' Motion to Strike the Report of Dr. Edward E. Leamer ("Reply") and the Reply Expert Report of Edward E. Leamer, Ph.D. ("Leamer Reply Report"). The Leamer Reply Report purports to analyze variations in salary ranges for certain Apple and Intel employees. Leamer Reply Report at ¶¶ 63-64. Plaintiffs reiterated Dr. Leamer's analysis on page 24 of their Reply. Because Dr. Leamer did not include this analysis in his initial expert report, Defendants had no opportunity to respond to this new information in their November 12, 2012 opposition to the class certification motion.

In a December 12 letter to the Court, Plaintiffs admit that statements regarding the salary information in Paragraph 63 of the Leamer Reply Report were inaccurate. *See* Dkt. 253. The

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] The data in Dr. Murphy's  
9 supplemental declaration provides a complete and accurate record of these employees'  
10 compensation.

11 Plaintiffs also submitted excerpts from Dr. Murphy's deposition. Ex. 13 to the  
12 Declaration of Dean Harvey. Dr. Murphy's deposition took place on December 3, 2012, after  
13 Defendants filed their opposition to Plaintiffs' class certification motion. Plaintiffs' excerpts are  
14 incomplete and misleading because they fail to take into account Dr. Murphy's complete  
15 testimony on the topics addressed. In particular, Plaintiffs' Reply cites deposition testimony  
16 acknowledging that in certain hypothetical situations, a small information imperfection could  
17 have large price effects. Reply at 9. But Plaintiffs' Reply omits Dr. Murphy's other testimony  
18 explaining that information imperfections are more likely to affect prices in "different directions"  
19 without necessarily resulting in market-wide impacts. Exhibit A to the Declaration of Eric Evans  
20 in Support of Defendants' Joint Administrative Motion ("Evans Dec.") at 185-186. Plaintiffs'  
21 Reply cites Dr. Murphy's testimony acknowledging a cold call can convey information  
22 regardless of whether compensation is discussed. Reply at 9, 11. But it fails to include Dr.  
23 Murphy's testimony that specific salary information is unlikely to be part of an initial call, and  
24 that "what we're really relying on" is that there are many other ways to recruit people apart from  
25 cold calls. Evans Dec., Ex. A at 134-137. Plaintiffs also quote part of Dr. Murphy's testimony  
26 noting that internal equity may be *one* factor influencing compensation. Reply at 16. But  
27 Plaintiffs completely omit Dr. Murphy's ensuing critique of Dr. Leamer's wage structure  
28 analysis based on the data. Evans Dec., Ex. A at 261-264.

1                   **Defendants Should Be Permitted to Supplement the Record**

2                   With respect to the compensation information regarding Apple and Intel employees at  
 3 paragraphs 63 and 64 of the Leamer Reply Report, the Ninth Circuit has held in the related  
 4 context of summary judgment that a district court should not consider new evidence submitted  
 5 on reply without providing an opportunity to respond. *See Provenz v. Miller*, 102 F.3d 1478,  
 6 1483 (9th Cir. 1996) (“[W]here new evidence is presented in a reply to a motion for summary  
 7 judgment, the district court should not consider the new evidence without giving the [non-]  
 8 movant an opportunity to respond.”) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th  
 9 Cir. 1990)); *see also* Hon. William W. Schwarzer, *et. al.*, 12-C Cal. Prac. Guide (2012) Fed. Civ.  
 10 Pro. Before Trial ¶12:107.1 (“[I]f the court relies on new material contained in a reply brief, it  
 11 must afford the opposing party a reasonable opportunity to respond.”) (citing *Beaird v. Seagate  
 12 Tech., Inc.*, 145 F.3d 1159, 1164–65 (10th Cir. 1998)). Dr. Murphy’s supplemental declaration  
 13 provides a brief and reasonable presentation of accurate and complete salary information in  
 14 response to the new and incomplete information in the Leamer Reply Report.

15                  With respect to Dr. Murphy’s deposition excerpts, Defendants seek leave to submit a  
 16 small number of additional excerpts that provide necessary context, correction and clarification.  
 17 “[W]hen one party has made use of a portion of a document, such that misunderstanding or  
 18 distortion can be averted only through presentation of another portion,” the other party may  
 19 submit the other parts of the document that provide clarification and context. *United States v.  
 20 Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S.  
 21 153, 172 (1988)). Defendants have had no other opportunity to submit the countervailing  
 22 excerpts from Dr. Murphy’s deposition, and under the rule of completeness should be permitted  
 23 to do so before the hearing.

24                  In accord with these principles, this Court and others in this District have allowed parties  
 25 to supplement the record under similar circumstances to address or rebut new and misleading  
 26 evidence first submitted with a reply. For example, this Court recently granted a party’s  
 27 administrative motion to augment the record with certain declarations and exhibits submitted  
 28 after the close of briefing, but shortly before the preliminary injunction hearing, because the

1 evidence was “rebuttal” evidence. *Apple v. Samsung*, Case No. 11-01846, 2011 WL 7036077 at  
2 \*4 & n.5 (N.D. Cal. Dec. 2, 2011). The court in another case granted a motion to file  
3 supplementary materials consisting of a declaration and six exhibits (memos, letters and a report)  
4 offered to rebut or clarify new evidence the other party had submitted on reply. *Baykeeper v.*  
5 *Union Pacific RR Co.*, Case No. 06-02560, 2009 WL 1517868 at \*1 n.1 (N.D. Cal. June 1,  
6 2009). And in another case, the court granted, in light of assertions made in a moving party’s  
7 reply, the opposing party’s motion to file as supplementary material the transcript of a deposition  
8 taken after that party filed its opposition. *Acco Brands, Inc. v. PC Guardian Anti-Theft Products,*  
9 *Inc.*, Case No. 04-03526, 2008 WL 2168379, at \*2 n.2 (N.D. Cal. May 22, 2008). Accordingly,  
10 Defendants should be permitted to file the limited supplementary evidence submitted with this  
11 motion.

12 **Conclusion**

13 The supplemental evidence should be filed and considered in connection with Plaintiffs’  
14 class certification motion.

15  
16 Dated: January 9, 2013 O’MELVENY & MYERS LLP

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**ATTESTATION:** Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from all signatories.